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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FOOD CHEMICAL NEWS INC., PUBLIC CITIZEN HEALTH RESEARCH GROUP and CENTER FOR SCIENCE IN THE PUBLIC INTEREST INC.,
Petitioners,

v.

JAMES BENSON, ACTING COMMISSIONER, FOOD AND DRUG ADMINISTRATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Did the court of appeals err in ruling that *Public Citizen v. Department of Justice*, 109 S. Ct. 2558 (1989), which held that the Federal Advisory Committee Act ("FACA") did not apply to the Department of Justice's use of the American Bar Association's Standing Committee on the Federal Judiciary, compelled the conclusion that an advisory committee formed at the specific request of a federal agency, to give advice directly to that agency, on important policy issues chosen by that agency, whose work will be paid for by that agency, is neither "established" nor "utilized" by that agency, and hence is not subject to FACA, because the agency used an independent contractor as an intermediary between it and the committee?

PARTIES TO THE PROCEEDING

Frank E. Young was the Commissioner of the Food and Drug Administration when the case was filed. When he resigned, the respondent James Benson was automatically substituted for him. In addition to the parties in the caption, the Federation of American Societies for Experimental Biology and the National Academy of Sciences appeared as *amici curiae* in the court of appeals supporting respondent. The petitioner Public Citizen Health Research Group is an unincorporated division of Public Citizen, Inc. None of the petitioners has any parent corporations, nor do they have any subsidiaries that are not wholly owned.

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OPINIONS BELOW

The opinion of the court of appeals is reproduced in the appendix to this petition at App. 1a-10a, and is reported at 900 F.2d 328. The opinion and order of the district court are set forth at App. 11a-22a and reported at 709 F. Supp. 5 (D.D.C. 1989).

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1990. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

The Federal Advisory Committee Act, Public Law 92-463, 86 Stat. 770, 5 U.S.C. App. II, section 3(2), provides in pertinent part:

> The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any other subcommittee or subgroup thereof . . . which is —
>
> . . .
>
> (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the federal government . . ..

STATEMENT OF THE CASE

Review is sought in this case because the court of appeals seriously misconstrued this Court's decision in *Public Citizen* v. *Department of Justice*, 109 S. Ct. 2558 (1989) ("*Public Citizen*"), which was issued after the district court ruled that the committee at issue here was both "established" and "utilized" by the respondent to

obtain advice, and hence was an "advisory committee" subject to the requirements of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. II. The court of appeals did not disturb any of the findings of the district court, but instead ruled that this Court's decision in *Public Citizen* required it to hold that FACA was inapplicable here. Because the ruling below dramatically expands the narrow exemption to the definition of an advisory committee crafted in *Public Citizen*, and thereby threatens to create a vast loophole in FACA that can and will be used to eviscerate the Act, this Court should grant review.

A. *Facts*

On March 29, 1988, in furtherance of its responsibilities under the food, drug and cosmetic laws, the Food and Drug Administration ("FDA") solicited bids on a contract to provide it with expert advice on a range of issues concerning the quality and safety of foods and cosmetics. The solicitation indicated that the most important factor in the agency's selection of a contractor would be the contractor's ability to draw on a wide range of recognized experts, and that "expert committees" rather than the contractor would "conduct the scientific reviews" called for by the agency. *See* Joint Appendix in Court of Appeals ("J.A.") 73. Of the two bidders for the contract, the agency chose the one whose proposal contemplated the use of expert panels to formulate the advice to be given to the FDA, which was submitted by the Federation of American Societies for Experimental Biology ("FASEB"), a nonprofit, membership corporation composed of six scientific associations. J.A. 92, 295.

Under the contract entered into between the FDA and FASEB, the agency agreed to assign FASEB between three and ten different tasks, with the specific subjects to be subsequently determined by the FDA. J.A. 97. To fulfill each task, the contract required FASEB to convene a panel of outside experts, who would then provide the FDA with a report that "reflect[s] the opinions of participating scientists," in the form of a "consensus of scientific opinion." J.A. 83, 91.

In August 1988, the FDA directed FASEB to carry out Task Order No. 3, under which it was required to "assemble an expert panel of scientists who have expertise in the area of life sciences, food sciences, and risk assessment of cost benefit analysis," and to issue a report on emerging issues in food safety and quality during the next decade. J.A. 111. Under that Task Order, which spelled out the issues on which FDA wanted advice (J.A. 111-12), the FDA will pay each panel member a *per diem* of approximately $150 for his or her participation, as well as travel and other expenses to support the work of the Expert Panel. J.A. 115, 130. In its technical proposal responding to the Task Order, FASEB promised that the Expert Panel would be composed of "eminent" individuals from "multiple sectors of the scientific community (broadly defined), including academia, industry, and consumers, as well government and professional associations." J.A. 122.

According to the contract and the Task Order, and based on FDA's prior use of similar committees, it was clear that the recommendations of the Expert Panel, rather than of FASEB, would be the end product of the Task Order. Thus, FASEB was required to send six copies of the Expert Panel draft report to the FDA even

before it was reviewed by FASEB. J.A. 126, 134, 310-11. FASEB's review of the final report was to be limited to determining whether the report meets the contract's scope of work requirements, is written in a scientific, scholarly manner, and is complete and supported by scientific evidence. J.A. 84, 309-10. Should FASEB and the Expert Panel disagree about the contents of the final report, either the Panel's views prevail, or no final report would be sent to the agency, in which case FASEB would be in breach of its contract. J.A. 310-11.

During the fall of 1988, FASEB contacted seven individuals who agreed to serve on the Expert Panel. None of them was employed by either FASEB or the federal government; rather, each worked in the private sector or academia. J.A. 141, 282, 286. Of the panel members, three are university professors, one is a former general counsel of the FDA and now a lawyer in private practice, one is vice president of the Howard Hughes Medical Institute, one is president of Consumer Choices, and one is vice president of the National Softdrink Association. J.A. 141. The letter from FASEB to the panel members confirming their appointments specifically stated that the panel was "establish[ed] . . . at the request of the Food & Drug Administration . . . to assist the Agency," not FASEB, and to provide the "opinion of the Panel," not FASEB, to the FDA, on issues of food safety and quality. J.A. 138.

On December 12, 1988, one month before the Expert Panel's first scheduled meeting, petitioners' attorneys informed the FDA that they believed that the Expert Panel is an "advisory committee," subject to FACA, because it is both "established" and "utilized" by the FDA for the purpose of obtaining advice and

recommendations. J.A. 142-45. FACA was passed by Congress in 1972 to control the proliferation of advisory committees, terminate them when they have outlived their usefulness, subject all committees to uniform standards and procedures, and require that their meetings and records be generally open to the public, with certain narrow exceptions. *See Public Citizen*, 109 S. Ct. at 2562. Because FASEB's letter to the panelists had indicated that the Panel's meetings would be held in private, petitioners requested the FDA to comply with FACA, principally by opening the meetings to the public. In response, the FDA contended that the Expert Panel was not subject to the Act and declined to open the meetings. J.A. 146-49

B. *Proceedings In the District Court*

Petitioners, three organizations that are concerned with food safety issues and the policies of the FDA, then filed this action in United States District Court for the District of Columbia on January 4, 1989. Subject matter jurisdiction was based on 28 U.S.C. § 1331. Petitioner Food Chemical News, Inc. publishes a weekly newsletter which is primarily devoted to food safety issues and which reports extensively on the role of the FDA to its approximately 3,000 subscribers. Public Citizen Health Research Group is a division of Public Citizen, a nonprofit public interest organization with approximately 60,000 members as of January 1989. It monitors issues affecting the safety of food, advocates policies aimed at assuring a safe food supply, and publishes a monthly newsletter, "Health Letter," that reports on food safety issues to approximately 45,000 subscribers. Petitioner Center for Science in the Public Interest, Inc. is also a nonprofit

membership organization dedicated to ensuring that the food supply is both safe and nutritious, and it, too, publishes a newsletter, "Nutrition Action Health Letter" that advises the Center's more than 100,000 members about food safety issues.

Petitioners agreed to allow the Expert Panel's meetings of January 11-13, 1989, which FDA officials were planning to address and all but 15 minutes of which were to be closed to the public, to go forward as scheduled, provided that an audio tape recording was made. J.A. 152. The agenda for those meetings stated that they were to begin with two high-ranking FDA officials informing the Panel of FDA's concerns and expectations under Task Order No. 3. J.A. 306-07.

The parties promptly cross-moved for summary judgment, and the district court issued an opinion on March 9, 1989, in which it found that "the material facts, none of which are in dispute, demonstrate that the expert panel was established by the FDA and is being utilized by the FDA" for the purpose of obtaining advice and recommendations. App. 14a. In finding that the Expert Panel met the "established" prong of the advisory committee definition, the court noted that "the FDA specifically contracted for an Expert Panel, put together by FASEB, to provide expert guidance to the agency on priorities in the coming decade." App. 16a.

The district court rejected the FDA's argument that the question of whether the Panel was established by the agency should be determined by asking which entity first proposed the use of outside experts: "Certainly an agency can be deemed to have 'established' an advisory committee even though the impetus for that establishment came from outside the agency." App. 14a.

The court ruled that the existence of an intermediary also did not answer the question; instead, the focus should be on whether the agency is seeking the advice of the committee or of the contractor. *Id.* Accordingly, because Task Order No. 3, drafted by the FDA, showed that the agency wanted the advice to come from the Expert Panel, not from FASEB, the agency had "established" the Expert Panel for purposes of FACA. App. 16a.

In the alternative, the district court found that the Expert Panel was being "utilized" by the FDA as an advisory committee. After examining the contractual relationships between the parties, the court observed that, "[a]lthough the final report to the agency will technically be from FASEB, the record makes clear that the report will be, in all material respects, a report of the Expert Panel." *Id.* The district court further pointed out that "FASEB will not be presenting its advice to the FDA; it can only present the Expert Panel's advice." App. 20a. Based upon these facts and its earlier finding that "FASEB cannot simply send its own opinions to the agency [but must] either send the panel's opinions or it can send no opinions and breach its contract with the FDA" (App. 18a), the district court concluded that the Expert Panel was being utilized by the FDA and hence was an advisory committee for that reason as well. App. 20a.

C. *The Ruling in Public Citizen*

After respondent filed a notice of appeal, this Court issued its decision in *Public Citizen*, which the court of appeals subsequently described as "a pathmarking opinion on the scope of FACA." App. 3a. Five members of this Court in *Public Citizen* concluded that FACA does

not apply to the Standing Committee on the Federal Judiciary of the American Bar Association (the "ABA Committee"), which advises the Department of Justice on prospective judicial nominees. The Department in turn utilizes that advice in assisting the President in deciding who to appoint as federal judges, pursuant to Art. II, § 2, cl. 2 of the Constitution. Three members of the Court disagreed with the statutory construction approved by the majority, but concurred in the result because they concluded that, if FACA did apply, it would violate separation of powers. Justice Scalia did not participate in the decision.

Among the most prominent factors that led the majority to exclude the ABA Committee from FACA were that the Committee dealt only with personnel matters not policy; that it was a preexisting entity, not formed at the behest of the government; that no government officials set its agenda or were present at any of its meetings; that it received no federal money to support its operation; and, perhaps most important of all, that application of FACA to it would raise serious constitutional questions. 109 S. Ct. at 2568, 2572-73.

D. *The Decision of the Court of Appeals*

The court of appeals reversed, based on what it described as the "controlling precedent" of *Public Citizen*. App. 3a. Despite the fact that *Public Citizen* concerned only the utilization prong of the definition of an advisory committee, the court of appeals believed that the majority's analysis "superseded" the prior interpretations of both the established and utilized tests under the Act. App. 7a. As the court below read *Public Citizen*, unless the agency actually picked the members of the committee

itself, the Act is limited to "'groups organized by or closely tied to the federal government, and thus enjoying quasi-public status.'" App. 8a, *quoting Public Citizen*, 109 S. Ct. at 2570. The court explained that "as we understand it, 'established' indicates 'a Government-formed advisory committee,' *Public Citizen*, 109 S. Ct. at 2570, while 'utilized' encompasses a group organized by a nongovernmental entity but nevertheless so 'closely tied' to an agency as to be amenable to 'strict management by agency officials.' *Id.* at 2568, 2570." App. 9a (footnote omitted).

Accordingly, the appeals court ruled that the Expert Panel did not fit within what it saw as a revised definition of an advisory committee, although it gave no examples of entities that would be covered. However, it did note that advisory committees which are formed by the National Academy of Sciences were "mentioned in passing" by this Court in *Public Citizen* as falling within those "formed by quasi-public organizations such as the National Academy of Sciences." App. 9 n.4, *quoting Public Citizen*, 109 S. Ct. at 2570. Nonetheless, the court declined to express an opinion on whether even those committees were advisory committees under the Act, but it did observe that the National Academy of Sciences had submitted an *amicus* brief in this case arguing that its committees were not subject to FACA and that this Court's *dicta* to the contrary was erroneous. *Id.*

For these reasons, the court concluded, "[a]s superseding Supreme Court instruction in *Public Citizen* requires, the decision of the district court declaring the Expert Panel ... 'an advisory committee' subject to the requirements of FACA is ... *Reversed*." App. 10a.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS BADLY MISCONSTRUED THIS COURT'S DECISION IN *PUBLIC CITIZEN* AND PRODUCED A RESULT THAT THREATENS TO UNDERMINE THE ENTIRE FEDERAL ADVISORY COMMITTEE ACT.

1. There is no question that the court of appeals ruled as it did because it believed that it was compelled to do so. Respondent told the court of appeals that this Court's decision in *Public Citizen* required reversal, and the court's repeated use of terms such as "pathmarking opinion," "controlling precedent," "superseding," and "requires," leaves no doubt that the court of appeals believed that it had no choice in deciding this case. That conclusion was in error for several reasons.

First, although the court below recognized that *Public Citizen* dealt only with the utilized prong of the definition of an advisory committee (App. 8a), it nonetheless asserted that this Court had issued "controlling precedent" on the established prong as well.

Second, the court failed to take into account the very significant differences between the ABA Committee and the Expert Panel on such matters as the role of the agency in the creation of the committee; the role of the agency in setting the tasks of the committee; the presence (or absence) of agency officials at committee meetings; and the payment (or lack thereof) by the government of fees and expenses for the committee and its members.

Third, and most important of all, the court of appeals never mentioned the fact that, as between two competing interpretations, "both plausible," but only one raising

constitutional issues, it was this Court's "unwillingness to resolve important constitutional questions unnecessarily [that] solidifie[d] our conviction that FACA is inapplicable" to the ABA Committee. *Public Citizen*, 109 S. Ct. at 2573. Indeed, the three concurring Justices read FACA as applying to the ABA Committee, but found that such a construction was unconstitutional. *Id.* at 2573-84.

There is a further reason to believe that this Court's decision in *Public Citizen* was a narrow one: the Department of Justice, the appellee there, did not ask for a sweeping exemption from FACA, but only a very narrow one tied to the role that the ABA Committee played in the process by which the President selected judicial nominees. Thus, the Department's brief in this Court specifically urged that, in addition to the desire to avoid constitutional issues, two factors in particular meant that FACA did not apply to the ABA Committee: the absence of federal funding and the fact that the committee dealt with personnel matters, not the implementation of legislative policy. (Brief at 27-29). Thus, it is highly unlikely that this Court intended its ruling to go beyond what the Department sought, to include a committee like the Expert Panel, which deals with important issues of federal policy *and* is funded entirely by the federal government.

Given the sweeping manner in which the court of appeals misconstrued this Court's decision in *Public Citizen*, review is essential to correct that error.

2. Review is also warranted because the decision below gives a blueprint to federal agencies that will enable them to avoid FACA, no matter what the issue, or how central it may be to the mission of the agency. If the ruling below is permitted to stand, any agency that

wishes to avoid FACA can simply sign a contract with a third party, under which the contractor, rather than the agency, will pick the advisory committee members, just as was done here. The agency could still dictate the role of the committee, the qualifications of its members, and the agenda for all meetings. It could also specifically provide, as it did here, that it is the advice of the committee, not the contractor that will be given to the agency. It could have its representatives attend all committee meetings, and it could pay all of the expenses of the committee and the salaries of its members. The agency could do all of these things, just as does for advisory committees that are subject to FACA, but it could avoid the openness, recordkeeping, and balanced representation requirements of FACA, so long as the contractor, and not the agency, had the formal power to designate the members of the committee. Nothing in this Court's decision in *Public Citizen* suggests that it contemplated permitting that kind of wholesale subversion of FACA.

The court of appeals offered nothing that would even discourage agencies from seeking to utilize this loophole to avoid FACA for most, if not all, of the thousand or so advisory committee that are in existence. *See Public Citizen*, 109 S. Ct. at 2562 n.4 (1020 committees for fiscal 1988). Obviously, most agencies would prefer to obtain advice without adhering to the strictures of FACA, which is why Congress passed the law in the first place. Moreover, respondent admitted in the court of appeals that even if the intermediary were a "nonentity," and hence its use essentially a sham, FACA would still not apply (Brief at 35). Based on this history, there is every reason to believe that, unless the decision below is

reversed, federal agencies will routinely utilize outside contractors to thwart FACA. In that event, only the political needs of the appointing authority—the President would probably not have allowed outsiders to choose the members of the Tower Commission that investigated the Iran-contra affair—would prevent the decision below from turning FACA into a statute that agencies would follow only when they, not Congress, choose.

Petitioners recognize that no other court has adopted or rejected this extraordinary position. However, a conflict in circuits is unlikely to develop, let alone develop soon, for two reasons. First, almost all of the FACA litigation to date has been in the D.C. Circuit, principally because almost all of the challengers and almost all of the agencies are located there. Second, given the preeminent role of the D.C. Circuit in FACA litigation, it is unlikely that a sister circuit will disagree with a unanimous ruling so closely on the heels of the decision in *Public Citizen*, especially if this Court denies certiorari.

Finally, we cannot overlook the significant irony in the result urged by the respondent and adopted by the court of appeals. As the Department of Justice urged, and this Court recognized in *Public Citizen*, FACA was enacted to curb unnecessary spending by federal advisory committees and to assure that the remaining committees were open and accountable. But now, under the decision below, agencies can entirely thwart the latter objective by the simple device of a contract intermediary, while at the same time undermining the former goal by paying contractors to insulate committees from the Act. It is difficult to imagine a result more out of touch with Congress' concerns in passing FACA.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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June 29, 1990

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 5, 1990 Decided April 6, 1990

No. 89-5142

FOOD CHEMICAL NEWS, *et al.*,
APPELLEES

v.

FRANK E. YOUNG, COMMISSIONER,
FOOD AND DRUG ADMINISTRATION,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 89-00011)

Marleigh D. Dover, Attorney, Department of Justice, with whom *Stuart M. Gerson*, Assistant Attorney General, *Jay B. Stephens*, United States Attorney, *Douglas N. Letter*, and *Victoria F. Nourse*, Attorneys, Department of Justice and *Leslie Kux*, Associate Chief Counsel for the Food and Drug Administration, were on the brief, for appellant.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Eleanor H. Smith, with whom *Alan B. Morrison* and *David C. Vladeck*, were on the brief, for appellees. *Katherine A. Meyer* also entered an appearance for appellees.

Jo V. Morgan, Jr., was on the brief for amicus curiae, Federation of American Societies for Experimental Biology, urging reversal.

James R. Wright, Calvin H. Cobb, Jr. and *Stuart Abercrombie Baker* were on the brief, for amicus curiae, National Academy of Sciences, urging reversal.

Before: RUTH B. GINSBURG, SILBERMAN, and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* RUTH B. GINSBURG.

GINSBURG, RUTH B., *Circuit Judge*: This appeal requires us to decide whether the Federal Advisory Committee Act (FACA), 5 U.S.C. App. II § 1 *et seq.* (1982 and Supp. V), applies to a group of experts selected and managed by a private scientific organization pursuant to the organization's contract with the Food and Drug Administration (FDA) to provide counsel on food and cosmetics safety issues. The contractor, Federation of America Societies for Experimental Biology (FASEB), is a federation of major bio-medical research organizations (the American Physiological Society, the American Society for Biochemistry and Molecular Biology, the American Society for Pharmacology and Experimental Therapeutics, the American Association of Pathologists, the American Institute of Nutrition, the American Association of Immunologists, and the American Society for Cell Biology). Implementing its contract with the FDA, FASEB assembled a group of seven experts to address food safety and quality issues of concern to the FDA's Center for Food Safety and Applied Nutrition. This expert group, titled Expert Panel on Emerging Issues in Food Safety and Quality During the Next Decade, was declared by the district court an "advisory committee" subject to the requirements of

FACA. *Food Chemical News v. Young*, 709 F.Supp. 5 (D.D.C. 1989).

Just over three months after the district court's decision, the Supreme Court released a pathmarking opinion on the scope of FACA: *Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558 (1989). Applying the analysis indicated in that controlling precedent, we conclude that the expert panel FASEB assembled pursuant to its contract with the FDA was not an "advisory committee" within the meaning of FACA. We therefore reverse the judgment of the district court.

I.

In March 1988, the FDA solicited bids for a contract to provide "expert, objective counsel to the [FDA'S] Center for Food Safety and Applied Nutrition on general and specific issues associated with the safety of food and cosmetics." *Food Chemical News*, 709 F.Supp. at 6. FASEB bid on the contract, stating that performance would be effected by FASEB's Life Science Research Office, a permanent FASEB department, composed of some ten resident scientists, established to "analyze problems in the life sciences for Federal and private agencies and organizations." Declaration of Kenneth D. Fisher, Director of FASEB's Life Science Research Organization, at 1. The FDA'S solicitation did not refer to implementation through the appointment of expert panels. FASEB, however, proposed the use of "ad hoc groups of knowledgeable experts" to identify and address important issues, and was granted the contract in June 1988.[1]

The contract between FASEB and the FDA provided for the periodic placement of "Task Orders" for services. This case centers on Task Order No. 3, captioned "Emerging Food Safety and Quality Issues for the Next

[1]There were only two bids for the contract. The other bidder did not propose the use of expert panels. Food Chemical News v. Young, 709 F.Supp. 5, 6 (D.D.C. 1989).

Decade." Task Order No. 3 directed FASEB, "the contractor," to "assemble the pertinent information" on emerging issues by "describing the issue, evaluating the current knowledge, and offering expert counsel on what is needed for FDA to adequately address[ ] the issue." Consistent with FASEB's bid, Task Order No. 3 further specified:

> The contractor shall assemble an expert panel of scientists who have expertise in the areas of life sciences, food sciences and risk assessment or cost benefit analysis. Members of the panel should represent academia, industry, consumer, government and professional associations as appropriate. The panel will prepare a report to the contractor[.]

Next, the Task Order instructed:

> The contractor shall review all comments and information prepared by the panel and prepare a report for submission for FDA.

To start the work Task Order No. 3 required, FASEB selected a group of experts and convened a first meeting of the panel January 11-13, 1989. Part of the meeting was open to the public, part was not. Just before that meeting took place, Food Chemical News, joined by Public Citizen Health Research Group and Center for Science in the Public Interest, commenced this litigation claiming that the ad hoc panel assembled pursuant to Task Order No. 3 should be subject to the public meetings and other requirements of FACA. Although plaintiffs initially sought a preliminary injunction, the parties eventually agreed that the district court should rule on the matter finally and dispositively, in response to their cross motions for summary judgment.

II.

Enacted in 1972, FACA responded to a congressional will to assess the need for the "numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in

the executive branch of the Federal Government." 5 U.S.C. App. II § 2(a); *see Public Citizen,* 109 S. Ct. at 2562. Congress, through FACA, sought

> to ensure that new advisory committees be established only when essential and that their number be minimized; that they be terminated when they have outlived their usefulness; that their creation, operation, and duration be subject to uniform standards and procedures; that Congress and the public remain apprised of their existence, activities, and cost; and that their work be exclusively advisory in nature.

Public Citizen, 109 S. Ct. at 2562, citing 5 U.S.C. App. II § 2(b).

Among the controls Congress installed, FACA requires each advisory committee to file a charter, 5 U.S.C. App. II § 9(c), and to keep detailed minutes of its meetings, *id.* § 10(c). Furthermore, a representative of the Federal Government, with authority to order adjournment, must attend advisory committee meetings. *Id.* § 10(e). The public is entitled to advance notice of advisory committee meetings, and generally to attend them. *Id.* § 10(a), (d). Subject to Freedom of Information Act limitations, advisory committee documents must be made available for public inspection. *Id.* § 10(b). Advisory committee membership is to be "fairly balanced in terms of the points of view represented and the functions" the committee performs. *Id.* § 5(b), (c).

FACA defines "advisory committee" to mean

> any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . , which is—
>
> (A) established by statute or reorganization plan, or
>
> (B) established or utilized by the President, or
>
> (C) established or utilized by one or more agencies,

> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

Id. § 3(2). We now turn to the dispositive question whether the Expert Panel on Emerging Issues in Food Safety and Quality During the Next Decade, the panel proposed, chosen, and convened by FASEB to work on Task Order No. 3, falls under FACA as a group or committee the FDA "established or utilized . . . in the interest of obtaining advice."

III.

We start with a key point that is not in dispute: FASEB and its Life Science Research Office do not figure in this case as an "advisory committee" subject to FACA; instead, FASEB falls under the main rule, made clear in the legislative history, that the "Act does not apply to persons or organizations which have contractual relationships with Federal agencies." H.R. CONF. REP. No. 1403, 92d Cong., 2d Sess. 2, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3508, 3509 (also stating that FACA does not apply to "advisory committees not directly established by or for [Federal] agencies"); *see also* H.R. REP. No. 1017, 92d Cong., 2d Sess. 4, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3491, 3494 (FACA term "advisory committee" does not include contractor or consultant hired by an officer or agency of the Federal Government). Congress was no doubt mindful that government contractors, unlike the groups that prompted enactment of FACA, *see supra* pp. 4-5, are subject to procurement regulations designed, or at least intended, to provide checks against waste and other misuses of government resources. *See, e.g.*, 48 C.F.R. §§ 9.500-505 (providing for identification and resolution of organizational conflicts of interest which

may impair a contractor's objectivity in performing contract work).

In the district court, plaintiffs successfully urged a distinction between FASEB, the contractor not subject to FACA, and the Task Order No. 3 expert panel. The district court recognized that the contractor proposed the use of an expert panel, chose the panel members, and was to prepare the report conveying the panel's advice. *Food Chemical News,* 709 F.Supp. at 6. Furthermore, the district court comprehended that the contractor's function was not simply to "rubber stamp" the panel's recommendations; instead, FASEB bore ultimate responsibility for determining whether the panel's report was "scientifically valid" and not "otherwise in error." *See id.* at 8; *cf. National Anti-Hunger Coalition v. Executive Comm. of President's Private Sector Survey on Cost Control,* 711 F.2d 1071, 1075-76 (D.C. Cir. 1983) (suggesting FACA applies to advisory groups if intermediaries are merely "rubber stamping" the group's recommendations "with little or no independent consideration"). Despite the prominent role of FASEB in proposing, selecting, and reviewing the panel, and FASEB's exemption from FACA, the district court held the expert panel an "advisory committee" within FACA's compass. The district court reasoned that the FDA "established" the panel because the FDA/FASEB contract *required* FASEB to assemble the panel as a means of obtaining the advice sought by the agency. *Food Chemical News,* 709 F.Supp. at 7-8. The district court further found that the FDA had "utilized" the panel because FASEB was to furnish the FDA with the panel's advice, not the contractor's. *Id.* at 8-9.

IV.

The FDA urges on appeal that the district court's reasoning has been superseded by the Supreme Court's analysis in *Public Citizen v. United States Dep't of Justice,* 109 S. Ct. 2558 (1989).[2] We agree. *Public Citizen* concerned the

[2]The FDA also urged that plaintiffs' standing is limited to the "open access" claim and does not extend to other matters, such

advice on potential nominees for federal judgeships that the Department of Justice regularly sought from the Standing Committee on Federal Judiciary of the American Bar Association (ABA Committee). Plaintiffs in that case had requested the names of potential nominees referred by the Department to the ABA Committee, the Committee's reports, and the minutes of its meetings; their court complaint asked for a declaration that the ABA Committee is an "advisory committee" as FACA defines that term.

Plaintiffs in *Public Citizen* conceded that the ABA Committee was not "established" by the President or the Justice Department; they maintained, however, that the Committee was "utilized by" the Executive Branch "in the interest of obtaining advice." *See* 5 U.S.C. App. II § 3(2), set out *supra* pp. 5-6. The Supreme Court rejected that argument. The Court concluded that Congress did not intend that the term "utilized" apply to the Justice Department's use of the ABA Committee. Accordingly, the Court ruled that the Committee was not subject to FACA controls.

Plaintiffs-appellees in this case ask us to read *Public Citizen* as carving out only a "narrow exception" to FACA's "broadly crafted" definition of "advisory committee." *See* Brief for Appellees at 37. We comprehend the *Public Citizen* opinion, however, as limiting FACA to "groups organized by or closely tied to the Federal Government, and thus enjoying quasi-public status." *Public Citizen*, 109 S. Ct. at 2570 (Congress intended to encompass groups established by the Executive Branch or

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as compliance with FACA's "balanced membership" requirement. The "open access" claim, however, presents the threshold question whether the expert panel FASEB assembled under Task Order No. 3 qualifies as an "advisory committee" within FACA's coverage. Because we hold that the panel is not within FACA's domain, we have no cause to address the FDA's contentions concerning the limited character of plaintiffs' standing. *See* Public Citizen v. United States Dep't of Justice, 109 S. Ct. 2558, 2564 n.7 (1989).

by statute and "offspring" of organizations "created or permeated by the Federal Government").

The Supreme Court's *Public Citizen* opinion initially observed: "There is no doubt that the Executive makes use of the ABA Committee, and thus 'utilizes' it in one common sense of the term." *Public Citizen*, 109 S. Ct. at 2565. The Court then proceeded firmly to reject "a literal reading" of the FACA provision defining "advisory committee." *See id.* at 2566, 2571. "[T]here is considerable evidence," the Court stated, that Congress, in enacting FACA, "sought nothing more than stricter compliance with reporting and other requirements — which *were* made more stringent — by advisory committees already covered by [existing regulations][3] and similar treatment of a small class of publicly funded groups created by the President." *Id.* at 2568 (emphasis in original).

Public Citizen, as earlier noted, focused on the term "utilized," but the Court defined that term in relation to the preceding term "established" in the statutory formulation: a group "established or utilized by" an agency. *See* 5 U.S.C. App. II § 3(2), set out *supra* pp. 5-6. In the Court's delineation, as we understand it, "established" indicates "a Government-formed advisory committee," *Public Citizen*, 109 S. Ct. at 2570, while "utilized" encompasses a group organized by a nongovernmental entity but nonetheless so "closely tied" to an agency as to be amenable to "strict management by agency officials." *Id.* at 2568, 2570.[4]

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[3]FACA drew upon Executive Order 11007, 3 C.F.R. 573 (1959-1963 Comp.), which applied when an advisory committee was "formed by a department or agency of the Government in the interest of obtaining advice or recommendations," or "not formed by a department or agency, but only during any period when it is being utilized by a department or agency in the same manner as a Government-formed advisory committee." *Id.*; *see Public Citizen*, 109 S. Ct. at 2567.

[4]The Court mentioned in passing that "utilized by" expanded the term "established" so as to make FACA applicable to advisory committees formed by "quasi-public organizations such as the

V.

Applying the analysis in *Public Citizen*, we hold that the expert panel here in question is not an "advisory committee" within the meaning of FACA. The panel was "established" by FASEB, not by FDA. FASEB proposed the panel, and alone selected its members. FASEB also set the panel's agenda, scheduled its meetings, and would have reviewed the panel's work. Similarly, FASEB was the entity that, by contract, directly "utilized" the panel. FASEB is a private organization and government contractor; it does not have "quasi-public status." *See Public Citizen*, 109 S. Ct. at 2570. The panel was to be managed by FASEB; it was "not amenable to [any] management by [FDA] officials," or "by [any] semiprivate entity the Federal Government helped bring into being." *See id.* at 2568, 2571. The final report, under the FDA contract and Task Order, was to be prepared and presented not by the panel but by FASEB.

CONCLUSION

As superseding Supreme Court instruction in *Public Citizen* requires, the decision of the district court declaring the Expert Panel on Emerging Issues in Food Safety and Quality During the Next Decade an "advisory committee" subject to the requirements of FACA is

Reversed.

National Academy of Sciences." *Public Citizen*, 109 S. Ct. at 2570. We note, but express no opinion on, the position pressed by the National Academy of Sciences, in an amicus brief in this case, that FACA's legislative history evidences a general intent to exclude from coverage the committees of the Academy. *See* Brief of the National Academy of Sciences at 10-18 (relying on Lombardo v. Handler, 397 F.Supp. 792, 798-800 (D.D.C. 1975), *aff'd without opinion*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977), which concluded that Congress did not intend FACA to apply to a committee created by the Academy pursuant to an Academy-EPA contract).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOOD CHEMICAL NEWS, *et al.*, Plaintiffs,	)	
v.	)	Civil Action No. 89-0011-LFO
FRANK E. YOUNG, *et al.*, Defendants.	)	FILED MAR 9 1989

CLERK, U.S. DISTRICT COURT, DISTRICT OF COLUMBIA

MEMORANDUM

On March 29, 1988, the Food and Drug Administration ("FDA") published Solicitation No. 223-88-2124, entitled "Analysis of Scientific Issues in Food and Cosmetic Safety." The solicitation sought a contract to provide "expert, objective counsel to the [FDA's] Center for Food Safety and Applied Nutrition on general and specific issues associated with the safety of food and cosmetics," Federal Defendant's Exhibit 1A at § B.1. The solicitation stated that one factor in the FDA's contracting decision would be the bidder's ability to draw on outside expertise in relevant disciplines. *See id.* at § M.2.a.; Federal Defendant's Memorandum in Support of Motion to Dismiss or, in the Alternative, for Summary

Judgment and in Opposition to Plaintiff's Motion for a Preliminary Injunction ("Federal Defendant's Opposition to Preliminary Injunction") at 6. The solicitation did not specifically require the appointment of an "Expert Panel" or task force. Two companies bid for the contract. Defendant Federation of American Societies for Experimental Biology ("FASEB") proposed the use of expert panels and was granted the contract in June 1988. See Federal Defendant's Statement of Material Facts as to Which There is No Genuine Issue at §§ 5, 6. The other bid did not propose the use of expert panels.

On September 30, 1988, the FDA presented FASEB with Task Order No. 3, which stated that FASEB "shall assemble an expert panel of scientists who have expertise in the areas of life sciences, food sciences and risk assessment or cost benefit analysis" to "prepare a report to the contractor, " who would then "review all comments and information prepared by the panel and prepare a report for submission to the FDA. " Plaintiffs' Exhibit C §§ C-2, C-3. FASEB then gathered a group of seven experts, none of whom are employed on a full-time basis by the government, to work on a panel that, in FASEB's own words, "will assist FDA in identifying and categorizing the important issues that will influence FDA's responsibilities for food safety and quality in the remaining decade of this century." Plaintiffs' Exhibit D at 2. This group has already held one meeting and has another meeting scheduled for March or April.

Plaintiffs claim that the Expert Panel should be subject to the requirements of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2, including a "balanced membership" and public meetings. Although plaintiffs originally sought a preliminary injunction, all

parties have now filed motions to dismiss or for summary judgment, and plaintiffs have requested that the hearing on the preliminary injunction be consolidated with a hearing on the merits. All parties now agree that this dispute should be resolved by these motions to dismiss or for summary judgment.

Defendant FASEB contends that plaintiffs have not stated a claim against it upon which relief can be granted because FACA "does not permit suit by a private party against another preexisting private party," and because a suit against the government is sufficient to provide relief under FACA. *Washington Legal Foundation v. American Bar Ass'n Standing Comm. on Federal Judiciary*, 648 F. Supp. 1353, 1361 & n.7 (D.D.C. 1986). Plaintiffs have not contested this contention. Accordingly, the accompanying Order will grant defendant FASEB's motion to dismiss for failure to state a claim upon which relief can be granted.

Plaintiffs and federal defendant filed cross-motions for summary judgment on the issue of whether the Expert Panel is an "advisory committee" under FACA. The Act defines an advisory committee as, *inter alia*,

> any committee, board, commission, council, conference, panel, task force, or other similar group,... which is... established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes... any committee which is composed wholly of full-time officers or employees of the Federal Government.

5 U.S.C. App. 2 at § 3. Plaintiffs and federal defendant agree that the Expert Panel must be considered an "advisory committee" if it was "established by" the FDA or is being "utilized by" the FDA. See Federal Defendant's Opposition to Preliminary Injunction at 11; Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 1. Because the material facts, none of which are in dispute, demonstrate that the Expert Panel was established by the FDA and is being utilized by the FDA, plaintiffs' motion for summary judgment must be granted.

On the establishment question, plaintiffs argue that Task Order No. 3 required FASEB to set up the Expert Panel and that the mere fact that FASEB chose the panel's members does not mean that the FDA did not "establish" the panel. Federal defendant, however, argues that the original solicitation did not require an expert panel and that FDA only issued Task Order No. 3 in response to FASEB's technical proposal in its bid that suggested such a panel. Thus, federal defendant claims that it was really FASEB, not FDA, that "established" the panel. The question of whether FDA established the Expert Panel, however, is not capable of resolution by simply deciding which entity first proposed the notion of an Expert Panel. Certainly an agency can be deemed to have "established" an advisory committee even though the impetus for that establishment came from outside the agency. Thus, the real issue is whether Task Order No. 3 mandates a committee of outside experts, in which case the FDA has established that committee, or whether the task order leaves the means of obtaining expert advice

solely in the hands of the contractor, in which case the FDA has not established the committee.

Task Order No. 3 states that its objective is "to provide, through outside expert means, counsel on issues that the scientific community considers of primary importance in the upcoming years." Plaintiffs' Exhibit C at § B-2. But the task order does not leave in doubt the question of how that expert advice is to be obtained. It specifically requires the contractor to "assemble an expert panel of scientists who have expertise in the areas of life sciences, food sciences and risk assessment or cost benefit analysis" that will prepare a report to the contractor for submission to the FDA. *Id.* at §§ C-2, C-3. Defendant FASEB admitted as much when, in a letter to the panel members, its Life Sciences Research Office stated that it was "establishing the Panel *at the request of the Food and Drug Administration (under FDA Contract No. 223-88-2124).*" Plaintiffs' Exhibit D at 1. Thus, the FDA, by issuing Task Order No. 3, established the Expert Panel.

Lombardo v. Handler, 397 F. Supp. 792 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977), which federal defendant relies on heavily, is not to the contrary. *Lombardo* held that a committee created by the National Academy of Sciences under a contract with the Environmental Protection Agency was not an "advisory committee" under FACA. Although the fact that the proposal to create a committee within the Academy to conduct the air pollution study at issue in that case appeared to originate with the Academy, rather than with the agency, was certainly a factor in the *Lombardo* court's decision, it was not a definitive factor. *See id.* at 797. Just as important, if not

more important, was a letter from the agency to the Academy "indicat[ing] that the E.P.A. was primarily concerned about the substance, scope and focus of the scientific study rather than with the internal organizational arrangements of the contractor performing the study." *Id.* Significantly missing from *Lombardo* was any contractual requirement placed by the agency upon the contractor as to *how* expert advice would be obtained. Thus, in *Lombardo* the agency hired the National Academy of Sciences to conduct a study and left the details of how that study was to be conducted up to the Academy. In contrast, in this case the FDA specifically contracted for an expert panel, put together by FASEB, to provide expert guidance to the agency on priorities in the coming decade. Task Order No. 3 indicates more than just agency "concern" over "the organizational arrangements of the contractor performing the internal study." Rather, Task Order No. 3 expressly mandates a certain organizational arrangement, namely an expert panel. Accordingly, even the *Lombardo* analysis yields the conclusion that the FDA established the Expert Panel within the meaning of FACA.

The panel is also being "utilized by" the FDA within the meaning of FACA. Although the final report to the agency will technically be from FASEB, the record makes clear that the report will be, in all material respects, a report of the Expert Panel. Even FASEB's Technical Proposal in response to Task Order No. 3. states, "*The ad hoc Expert Panel will prepare a documented report* that addresses these topics [*i.e.* FDA priorities]." Federal Defendant's Exhibit lE at T-3 (emphasis added). The role of the FASEB staff assigned to this contract is "to support and administer the ad hoc Expert Panel's

activities," not to provide substantive input. *Id.* at T-4. Indeed, FASEB is only assigning three individuals to work on this project: a Project Director, an Administrative Assistant, and a Secretary. *See* Plaintiffs' Exhibit C at § C-5(A). FASEB is only supplying administrative assistance; the Expert Panel is supplying the expertise that will be "utilized by" the FDA. As Kenneth D. Fisher of FASEB's Life Sciences Research Office ("LSRO") stated in FASEB's response to the FDA's original solicitation, "Discussion of the participants at the ad hoc group meeting constitutes the major basis for the LSRO report to the sponsoring agency." Federal Defendant's Exhibit 1B at Enclosure T-4, § D; *accord* Federal Defendant's Exhibit 1E at T-5. Indeed, a FASEB brochure presented by plaintiffs nowhere indicates that FASEB has the capacity to provide scientific expertise. Instead, the brochure advertises such services as "membership maintenance and dues billing, bookkeeping and accounting, meeting and exhibit management,... publication and composition, printing and data processing" and the availability of facilities including a "well-equipped print shop," a mail room, and four conference rooms. Plaintiffs' Exhibit B.

Furthermore, the procedures to be followed in the preparation of the report to the FDA guarantee that the opinions expressed therein will be those of the Expert Panel and not those of FASEB. Although the FASEB staff will draft an initial report, that report will be based on the Expert Panel's deliberations, will be revised by the FASEB staff as directed by the panel, and must be approved by the Expert Panel before it can be submitted to the agency to fulfill FASEB's contractual obligations. *See* Federal Defendant's Exhibit 1B at T-8, Exhibit 1E at

T-7. In addition, the FDA will be sent a draft report before any FASEB supervisory personnel ever reviews the report. *See* Federal Defendant's Exhibit 1E at T-7. Even when the FASEB Board does review the report, however, it will only be asked to determine if the report meets the contract's scope of work requirements, is written in a scientific, scholarly manner, and is complete and scientifically valid. See Declaration of Kenneth D. Fisher, Ph.D. , Federal Defendant's Exhibit 2 at § 4. The FASEB Board will not be asked to assess the value of or make any independent contribution to the substantive opinions contained in the report. As long as the opinions are scientifically valid—surely a less than stringent criterion in the realm of opinions regarding priorities—and well-written, the FASEB Board must approve the report even though its members might personally provide the FDA with different advice. This further proves that the advice the FDA is seeking is the advice of the Expert Panel, not the advice of FASEB.

Even the "final review" by the FASEB Executive Director, relied on so heavily by federal defendant, does not convert the report into a FASEB report rather than an Expert Panel report for purposes of FACA. If the Executive Director determines that the report "is not scientifically valid or is otherwise in error" and the Expert Panel refuses to modify the report, "FASEB would not forward the report to the sponsoring agency." *Id.* at § 6. Thus, FASEB cannot simply send its own opinions to the agency. It can either send the panel's opinions or it can send no opinions and breach its contract with the FDA. Therefore, if the agency is to utilize anybody's opinions, it will be the opinions of the Expert Panel, not the opinions of FASEB.

Again, *Lombardo* is not to the contrary on the question of whether the Expert Panel is being "utilized by" the FDA. First, the *Lombardo* court was heavily influenced by legislative history specifically addressing the special role of the National Academy of Sciences. *See Lombardo*, 397 F. Supp. at 798-800. Second, the legislative history upon which the *Lombardo* court relied to divine a legislative intent to exclude from FACA "groups providing advice to federal agencies pursuant to a contractual relationship" is ambiguous and is not reflected in any statutory provision. Had Congress intended to exclude from FACA all committees formed by government contractors, it could easily have so provided in the statute. But it did not.

Finally, the *Lombardo* court noted that the Department of Justice in 1973 concluded, in spite of the legislative history cited in *Lombardo*, that the mere existence of a contractual relationship could not automatically remove a committee from the coverage of FACA. Rather, the Department of Justice identified the "substance of the relationship" between the agency and the contractor—focusing specifically on the review procedures by which the contractor did or did not exercise control over the committee's report—as the critical element in determining whether a committee formed by a contractor was being utilized by the agency. *See id.* at 800 n.22. Although the *Lombardo* court did not similarly refer to this factor as "controlling," it did consider the relationship between the contractor and the committee. Concluding that the final report would be a report of the National Academy of Sciences rather than a report of the Academy's committee, the court held that the agency

was, therefore, utilizing the Academy, not the Academy's committee. *See id.* at 800.

In contrast, as has been discussed *supra*, FASEB's review procedures are such that the final report will, in all material respects, be a report of the Expert Panel, not of FASEB. In *Lombardo*, the National Academy of Sciences was utilizing a committee to assist it in providing *its* advice to the Environmental Protection Agency. In this case, however, FASEB will not be presenting its advice to the FDA; it can only present the Expert Panel's advice. *See supra* at 9. Because even the *Lombardo* court recognized that the legislative history upon which it was relying was ambiguous and heavily influenced by the special role of the National Academy of Sciences, *see Lombardo*, 397 F. Supp. at 800, and because the only remaining factor considered by the *Lombardo* court—the nature of the relationship between the contractor and the committee—indicates that the substance of the report submitted to the FDA will come exclusively from the committee rather than from the contractor, the FDA must be found to be utilizing the Expert Panel.

Because the material facts not in dispute indicate that the Expert Panel is an advisory committee within the meaning of FACA, the accompanying Order will grant plaintiffs' motion for summary judgment and declare that the Expert Panel is subject to the provisions of FACA. Assuming that federal defendant will comply fully and in good faith with the law here declared, no injunction is necessary at this time. Nevertheless, plaintiffs retain the ability to apply for injunctive relief if the Court's

confidence in federal defendant should prove to be misplaced.

DATE: March 8, 1989

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOOD CHEMICAL NEWS, *et al.*, Plaintiffs,	)	
v.	)	Civil Action No. 89-0011-LFO
FRANK E. YOUNG, *et al.*, Defendants.	)	

FILED
MAR 9 1989

CLERK, U.S. DISTRICT COURT, DISTRICT OF COLUMBIA

ORDER

For the reasons stated in the accompanying Memorandum, it is this 8th day of March, 1989, hereby

ORDERED: that defendant Federation of American Societies for Experimental Biology's motion to dismiss should be, and is hereby, GRANTED; and it is further

ORDERED: that federal defendant's motion to dismiss and motion for summary judgment should be, and are hereby, DENIED; and it is further

ORDERED: that plaintiffs' motion for summary judgment should be, and is hereby, GRANTED; and it is further

ORDERED: that plaintiffs' motion for a preliminary injunction should be, and is hereby, DENIED as moot, and it is further

DECLARED: that the Expert Panel on Emerging Issues in Food Safety and Quality During the Next Decade ("Expert Panel") is an "advisory committee" subject to the requirements of the Federal Advisory Committee Act, 5 U.S.C. App. 2, *as amended*; and it is further

DECLARED: that plaintiffs are entitled to an award of reasonable attorneys' fees and costs in this action pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

(2)

No. 90-23

Supreme Court, U.S.
FILED
AUG 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

FOOD CHEMICAL NEWS, INC., ET AL., PETITIONERS

v.

JAMES BENSON, ACTING COMMISSIONER,
FOOD AND DRUG ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Advisory Committee Act applies to a panel of experts convened and used by a private organization under contract with the federal government.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 900 F.2d 328. The opinion of the district court (Pet. App. 11a-22a) is reported at 709 F. Supp. 5.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1990. The petition for a writ of certiorari was filed on June 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1972, Congress enacted the Federal Advisory Committee Act, 5 U.S.C. App. 1. The statute attempts, inter alia, to reduce the number and costs of certain groups advising Congress, the President, and federal agencies, to terminate those that have outgrown their usefulness, to increase the accountability of those that remain, and to provide uniform procedures for their "establishment, operation, administration, and duration." 5 U.S.C. App. 2(b)(4).

The Act governs any "advisory committee"—defined as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof" that is "established" or "utilized" by the President, by the Congress, or by an Executive Branch agency. 5 U.S.C. App. 3(2).[1] An "advisory committee" is duly established only upon the filing of a public charter, which expires in two years. 5 U.S.C. App. 9(c), 14(a)(2). For such committees, the Act mandates public scrutiny: Each meeting of the "advisory committee" must be "open to the public," 5 U.S.C. App. 10(a); chaired or attended by a government representative, 5 U.S.C. App. 10(e); recorded in detailed minutes made available for "public inspection and

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[1] The Act provides in part, 5 U.S.C. App. 3(2):

> The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof * * * which is—
>
> * * * *
>
> (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government * * *.

copying," 5 U.S.C. App. 10(b) and (c); and preceded by advance notice in the *Federal Register*, 5 U.S.C. App. 10(a)(2).

2. To assist in directing its future regulatory efforts, the Food and Drug Administration (FDA) in March 1988 solicited bids for a contract to obtain expert advice on a range of issues associated with the safety of food and cosmetics. Pet. App. 11a. The Federation of American Societies for Experimental Biology (FASEB) bid on and was awarded the contract. The solicitation by the FDA did not require the contractor to appoint expert panels or to maintain any particular organizational structure, Pet. App. 3a, but FASEB proposed using ad hoc groups of knowledgeable experts as a means of carrying out the contract. While FASEB proposed obtaining the scientific community's consensus, in part, by convening ad hoc panels of experts, the proposal made plain that the "[d]raft reports, revisions, and tentative and final reports are [to be] prepared by [FASEB's] LSRO [Life Science Research Organization] scientific staff." C.A. App. 83.

The contract between the FDA and FASEB provided that the FDA would assign FASEB up to ten different "tasks," with the subjects to be determined by the FDA at a later date. Incorporating the approach outlined by FASEB in its technical proposal to the solicitation, C.A. App. 305-306, the FDA issued Task Order No. 3 in August 1988, requesting FASEB's advice on emerging food safety issues. In accord with FASEB's bid, the Task Order specified that, C.A. App. 111:

> The contractor shall assemble an expert panel of scientists who have expertise in the areas of life sciences, food sciences and risk assessment or cost benefit analysis. Members of the panel

> should represent academia, industry, consumer, government and professional associations as appropriate. The panel will prepare a report to the contractor[.]

But the Task Order further required that, *ibid.*:

> The contractor shall review all comments and information * * * and prepare a report for submission to FDA.

To start the work that Task Order No. 3 required, FASEB members identified the relevant issues, undertook a literature search, requested pertinent information from the public, and identified experts in the field. C.A. App. 124-125, 182. They also analyzed data and drafted background material for the proposed panel.

In the meantime, FASEB invited experts to work with LSRO in completing the contract. The planned ad hoc working panel was scheduled to meet twice. C.A. App. 138. The panel members were selected by the LSRO, but "[a]t no time during this selection process was any FDA official made aware of the list of candidates." C.A. App. 299. Chosen primarily from the ranks of professional scientists affiliated with academic institutions, members also included one individual associated with a consumer group, one from an industry association, and a third from a private law firm. *Ibid.* A panel meeting was held on January 11-13, 1989, part of which was open to the public and part of which was not, and a further meeting was scheduled for April 1989. C.A. App. 300.

3. Shortly before the January 1989 meeting took place, petitioners brought this suit against FASEB and the FDA, claiming that the ad hoc panel assembled by FASEB was subject to the FACA. Petition-

ers conceded that the FASEB itself was not an "advisory committee" under the FACA, C.A. App. 179, but petitioners claimed that FASEB had an "advisory committee" within it in the form of the panel.

The district court entered judgment for petitioners. Pet. App. 11a-22a. The court dismissed FASEB on the ground that it was a private corporation to which FACA did not apply, a conclusion that the district court found petitioners had not "contested." *Id.* at 13a. At the same time, the court held that the panel was "established" by the FDA under FACA, since the FDA had issued the Task Order requesting FASEB to go forward with its technical proposal to set up the panel. *Id.* at 15a-16a. The court also held that the panel was "utilized" by the FDA for purposes of FACA, because the FDA used the panel's advice. *Id.* at 16a-20a.

4. The court of appeals reversed. Pet. App. 1a-10a. Relying on *Public Citizen* v. *United States Dep't of Justice*, 109 S. Ct. 2558 (1989), the court of appeals held that the term "established" "indicates 'a Government-formed advisory committee,'" while the term "utilized" "encompasses a group organized by a nongovernmental entity but nonetheless so 'closely tied' to an agency as to be amenable to 'strict management by agency officials.'" Pet. App. 9a (quoting *Public Citizen*, 109 S. Ct. at 2568, 2570). Applying that analysis to this case, the court of appeals held that the expert panel was not "an advisory committee" within the meaning of FACA. The court concluded that "the panel was 'established' by FASEB, not by FDA," because the panel was proposed by FASEB, and FASEB alone selected its members and agenda, scheduled its meetings, and intended to review its work. Pet. App. 10a. Turning to the "utilized" prong of the test, the court noted

that the "final report, under the FDA contract and Task Order, was to be prepared and presented not by the panel but by FASEB." *Ibid.* The panel also "was to be managed by FASEB; it was not amenable to [any] management by [FDA] officials," or "by [any] semiprivate entity the Federal Government helped bring into being." Thus, the court concluded that FASEB, not the FDA, was the entity that "utilized" the panel. *Ibid.*

ARGUMENT

1. Although petitioners argue that the court of appeals misconstrued the terms "established" and "utilized" in FACA, petitioners make no serious effort to explain what the correct interpretation of those terms should be. Instead, petitioners complain that, for three reasons, the court of appeals misread those terms. Petitioners' complaints lack merit.

a. Petitioners contend that the court below should not have treated this Court's decision in *Public Citizen* as a "controlling precedent" on the meaning of the term "established" in FACA. Pet. 11. But the court of appeals correctly noted that although the holding in *Public Citizen* dealt only with the term "utilize," this Court's decision also sheds light on the meaning of the term "establish." If "utilize" means to create an advisory committee indirectly through a quasi-public entity, 109 S. Ct. at 2570, "establish" then logically refers to the direct creation of such a committee by an agency itself. In fact, *Public Citizen* itself suggested that dichotomy. *Ibid.* Thus, the court of appeals correctly recognized that *Public Citizen* is instructive on the meaning of the term "establish." [2]

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[2] That interpretation of the term "establish" is supported by FACA's legislative history. The Conference Committee

b. Petitioners also claim that the court of appeals failed to consider the FDA's role in creating the panel and in setting its tasks. Pet. 11. But the court did consider the FDA's role; it just rejected petitioners' claims. In the court of appeals, petitioners argued that the *Public Citizen* case was inapposite, since the ABA committee was not formed at the government's request and the Justice Department did not control the ABA committee. Under *Public Citizen*, however, whether an agency has requested formation of a committee is relevant only if the agency makes the request of a quasi-public entity. 109 S. Ct. at 2570. FASEB is not a quasi-public entity; it is a private organization, as the district court held, Pet. App. 13a. And even if FASEB were a quasi-public entity, the panel at issue here was not formed at the government's request; it was proposed by FASEB. C.A. App. 331, 332. Moreover, the FDA does not "control" the panel. The FDA's contract is with FASEB, not the panel, and it is FASEB that selects the panel's members, briefs them, gathers data for their consideration, and schedules their meetings. C.A. App. 81-86. Although the FDA, through its contract with FASEB, dictates the subject matter of the panel's deliberations, so, too, does the Department of Justice "control" the subject matter of the ABA Committee's deliberations by informing the Committee of the names of judicial nominees. The panel here is therefore no more an FDA advisory committee under the FACA than the ABA Committee on Fed-

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Report states that "[t]he Act does not apply to persons or organizations which have contractual relationships with Federal agencies nor to advisory committees not directly established by or for such agencies." H.R. Conf. Rep. No. 1403, 92d Cong., 2d Sess. 10 (1972); *Public Citizen*, 109 S. Ct. at 2570.

eral Judiciary was an advisory committee to the Department of Justice.

c. Petitioners also argue that the interpretation of the term "utilize" adopted in *Public Citizen* should be limited to the particular facts of that case since a more expansive reading of that term would have raised a serious question of the constitutionality of the Act as applied to the ABA Committee. Pet. 11-12. Although in *Public Citizen* the Court noted that a contrary ruling would present substantial constitutional questions, the Court's holding that the term "utilize" should be defined as "formed indirectly by quasi-public organizations," 109 S. Ct. at 2570, was not dependent on those questions. Indeed, the Court explicitly said that the result did not turn on the presence of those constitutional questions; rather, those questions provided "one additional consideration which, in our view, tips the balance decisively against FACA's application," *id.* at 2572, and that only "solidifies our conviction that FACA is inapplicable," *id.* at 2573.[3]

2. Petitioners contend that review by this Court is necessary because agencies can now "thwart" the purposes of the FACA "by the simple device of a contract intermediary." Pet. 14. But petitioners ignore the fact that Congress itself clearly intended to exempt contractors from the Act and, as the court of

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[3] Petitioners also claim that the court of appeals misread FACA because that court adopted a narrower interpretation of FACA than the one that the government endorsed in the *Public Citizen* case. Pet. 12. This Court in *Public Citizen*, however, adopted an interpretation of the statute that differed from the one proposed by the government. Accordingly, it was to this Court's decision in *Public Citizen*, not to the government's brief in that case, that the court of appeals properly looked.

appeals explained, Pet. App. 6a-7a, had good reason for doing so.

Petitioners also raise the spectre of sham contracts used in order to avoid complying with FACA.[4] But petitioners do not, and cannot claim that this contract with FASEB, a well-respected scientific organization, was a sham, and there is no basis for petitioners' suggestion that the FDA or any other agency would enter into a sham arrangement to avoid the requirements of the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1990

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[4] Petitioners erroneously claim that we have taken the position that FACA would not apply even if an intermediary were a " 'nonentity,' and hence its use essentially a sham." Pet. 13. The government's reply brief in the court of appeals acknowledged that an agency could not avoid FACA by entering into a contract with such an organization. Gov't C.A. Reply Br. 3 ("The only exception would be the case in which the so-called parent organization is a sham—which the Federation is not—and the subcommittee is in fact the organization with which the government will deal.").

* The Solicitor General is disqualified in this case.

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